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No. 96-_____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

SHEARSON LEHMAN BROTHERS, INC.f/k/a SHEARSON LEHMAN HUTTON, INC.and SHEARSON LEHMAN BROTHERS HOLDINGS, INC.f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.,
*Petitioners*,
v.
HUGHES, HUBBARD & REED,
*Respondent*

**Petition for Writ of Certiorari to the Supreme Court of the State of Texas**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Can the state courts of Texas constitutionally exercise long-arm jurisdiction over a national law firm when it is sued for inadequately representing its underwriter client before the Texas Securities Board relating to the blue sky registration of the securities of a Texas partnership?

2. Can the state courts of Texas constitutionally exercise long-arm jurisdiction over a national law firm when it is sued for incorrectly advising its underwriter client regarding Texas securities laws and regulations when such advice subjects the underwriter to regulatory enforcement action by the Texas Securities Board?

3. Should a trial court address the merits of plaintiff's claims in determining whether it can constitutionally exercise personal jurisdiction over the defendant?

4. Can the state courts of Texas constitutionally exercise long-arm jurisdiction over a national law firm when it is sued by its client, a national underwriting company, for breach of the law firm's fiduciary duties and for breach of contract related to the law firm's conflicting representation of a Texas partnership and company?

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc. (together "Shearson"), pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Texas.

## OPINIONS BELOW

Shearson sued its lawyers, Hughes, Hubbard & Reed (or "HHR"), for (a) advising incorrectly regarding Texas law, (b) failing to represent Shearson adequately in registering securities of Texas-based Houston Partners, L.P. before the Texas Securities Board, and (c) breaching its fiduciary duty to Shearson by representing a conflicting Texas client.

HHR filed a special appearance challenging the trial court's exercise of personal jurisdiction, which was granted with the notation, "the case should be removed to a New York forum." Appendix A at 1a-3a. The trial court also signed HHR's proposed findings and conclusions *verbatim* the day they were received, retaining even the title, "[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING SPECIAL APPEARANCE."

The court of appeals affirmed the dismissal. *Shearson Lehman Bros. v. Hughes, Hubbard & Reed*, 902 S.W.2d 60 (Tex.App. -- Houston [1st Dist.] 1995, writ denied)(appendix C at 4a-20a).

The Texas Supreme Court denied writ of error on November 22, 1995 (appendix D at 21a) and denied Petitioners' motion for rehearing of that denial on January 11, 1996 (appendix E at 23a).

## GROUNDS FOR JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257. In accordance with Rule 13.4 of this Court, this petition was timely filed within 90 days of the Texas Supreme Court's denial of Petitioners' motion for rehearing.

## CONSTITUTIONAL PROVISION INVOLVED

This action arises from the protections of the fourteenth amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Houston Biotechnology, Inc. ("HBI" or "Houston Biotech") hired Shearson's predecessor, E. F. Hutton & Company Inc. ("Hutton"), as the underwriter for a public offering to raise funds for research at HBI's facility in The Woodlands near Houston.[1]

Hutton, as underwriter, turned to HHR, one of its regular outside counsel, to represent it in negotiations with Houston Biotech and in the planned offering of its securities. Hutton hired HHR primarily for its purported "blue sky" expertise. HHR, which claimed a national blue sky practice, was eventually hired to register Houston Biotech's securities in all 50 states.

Despite this being HHR's regular practice area, however, something went horribly wrong in Texas: Shearson became subjected to adverse regulatory action by the Texas Securities Board, which caused it to expend over $5.4 million in a rescission offer to every Texas purchaser of the Houston Biotech securities.

Shearson later sued HHR in Texas for malpractice and breach of fiduciary duty, but that suit was dismissed on

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[1] Hutton merged into Shearson mid-way through the subject public offering.

the basis that the trial court lacked personal jurisdiction over HHR despite its Texas-centered activities. Shearson requests that this Court review that decision because it is based on reasoning that is inconsistent with the opinions of this Court and because it establishes a dangerous precedent on an important issue of constitutional law.

**The background to Shearson's malpractice claim**

HHR represented Hutton in all aspects of the Houston Biotech offering, including an early decision to offer limited partnership units in a newly formed entity, Houston Biotech Partners, LP ("Houston Biotech Partners") and in drafting the documents creating Houston Biotech Partners and registering it to do business in Texas. HHR travelled to Texas once to conduct due diligence and again to print the documents that (a) created Houston Biotech Partners and (b) defined Hutton's and Houston Biotech's rights in the offering, including *their agreement that Houston Biotech would pay all blue sky filing fees*.

HHR also participated in deciding how many units to register in Texas. Complicating that decision, Houston Biotech had limited cash reserves prior to the offering and wanted to pay the smallest possible registration fee.[2] HHR accordingly advised Hutton to register fewer securities in Texas than Hutton planned to sell. Then, HHR prepared the Texas application for only $1 million, despite its knowledge that Texas sales would far exceed that amount.

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[2] Texas' fee schedule is based on a percentage of the securities expected to be sold, with no maximum, so the more securities registered, the higher the fee. Most states have a maximum fee by which an unlimited number of securities can be sold, eliminating the possibility of an oversale.

Although HHR's advice and Texas application virtually assured a Texas oversale, HHR did no research to determine the effect of such an oversale and did not advise Hutton of the consequences of selling more than the registered amount.

Following the initial Texas application, HHR, as Hutton's legal representative, communicated with the Texas Securities Board in support of the Houston Biotech offering. HHR also had other direct communications with individuals in Texas as part of its efforts in Hutton's behalf.

HHR's duties in the nearly year-long offering included filing the final sales report required by the Texas Securities Board, one purpose of which was to detect an oversale or other potential regulatory problem, so that the registration could be corrected. In preparing the sales report for Texas in May of 1988, HHR learned that more Houston Biotech securities had been sold in Texas than were initially registered.

The discovery of the Texas oversale caused immediate concern, because HHR knew that if the registration was not corrected Shearson or Houston Biotech could be required to offer to rescind all the securities sales in Texas -- exactly what eventually occurred.

HHR advised Shearson orally and in writing that the Texas oversale could be cured by retroactively amending the initial registration application by paying three times the normal filing fee for the oversold portion of the securities, a cost of approximately $15,000. Despite the potentially devastating consequences, however, HHR did no legal research to substantiate this advice, relying instead on one HHR partner's off-the-cuff opinion of Texas law.

If HHR had done even the barest research to substantiate its advice regarding Texas law, it would have learned that the deadline for paying the required $15,000 fee was one year from the effective date of the initial Texas registration, or July 23, 1988, and HHR would also have learned that failing to meet that deadline would trigger exactly what HHR feared -- a rescission offer to all Texas investors. The remedy, its deadline, and the consequences of failing to meet that deadline are all expressed in the same section of the same statute.

In response to HHR's incomplete advice, but consistent with its original agreement with Houston Biotech, Shearson directed HHR to instruct Houston Biotech to pay the additional registration fee. For a number of reasons explained in the next section, HHR totally ignored that instruction and instead advised Houston Biotech (at its office in Houston) to pay only the non-penalty portion of the required fee amount (approximately $5,000). Beyond ignoring Shearson's instructions, HHR also neglected to inform Shearson of Houston Biotech's refusal to pay the remedial portion of the fee.

The July deadline passed without Shearson's ever being informed of the deadline or of Houston Biotech's resistance to paying the fee.

As a direct result of HHR's incomplete representation of Shearson before the Texas Securities Board and its failure to follow Shearson's instructions in communicating to Houston Biotech, Shearson lost its opportunity to correct the problem for a cost of $15,000 and instead became forced by the Texas Securities Board to offer rescission to all Texas purchasers of the Houston Biotech securities. That offer cost Shearson over $5.4 million.

**The background to Shearson's claim for breach of fiduciary duty**

Shearson's claim for breach of fiduciary duty derives from HHR's divided loyalties between Shearson and the Houston Biotech entities, which stemmed from Hutton's merger into Shearson in early 1988, mid-way through the offering.

Hutton originally had a management interest in Houston Biotech Partners, but its merger into Shearson triggered a right in Houston Biotech to assume that interest. HHR drafted the documents that transferred that role from Hutton to Houston Biotech.

Since HHR already had an attorney/client relationship with Shearson (the underwriter) and Houston Biotech Partners (the issuer), the transfer of partnership management from Hutton to Houston Biotech created the potential for a conflict of interest; following the merger, the partnership would no longer be controlled by HHR's client, Hutton, but instead by its other client, Houston Biotech, and HHR would begin receiving its instructions for the partnership from Houston Biotech.

HHR wrote Shearson of the possible conflict and expressly promised Shearson that if the conflict materialized it would withdraw from representing all parties.

Risk from the conflict weighed against Shearson because HHR's client contacts at Shearson were former Hutton people, many of whom departed Shearson soon after the merger, threatening reduction in HHR's blue sky work. That risk became personified in John Crary, HHR's main Hutton contact for blue sky work and the principal Hutton/Shearson representative for the Houston Biotech offering.

Shortly after the merger and unbeknownst to Shearson, Crary decided to leave Shearson *to join the Houston Biotech entities*.

Crary confided to HHR (but not to Shearson) his plan to move to the Houston Biotech entities, and HHR assisted Crary's departure from Shearson, including drafting a consulting agreement between Crary and the Houston Biotech entities and an agreement enabling Crary to purchase an interest in the partnership. HHR invoiced its time for that assistance to Shearson.

Importantly, at the same time Crary was actively preparing, with HHR's (and Shearson's unwitting) assistance, to jump from Shearson to the Houston Biotech entities, HHR (supposedly in behalf of Shearson) was also drafting numerous documents to effectuate Houston Biotech's takeover of Shearson's management role, all of which were reviewed and signed in behalf of Shearson by John Crary -- as he and HHR covertly planned his employment change to the other party to those agreements.

Shearson's claim for breach of fiduciary duty is based on HHR's conflicting representation of the Houston Biotech entities, which manifested itself when Crary decided to leave Hutton/Shearson. When Crary's loyalties shifted, HHR's loyalties also shifted, despite HHR's earlier written promise to the contrary. As a result of that shift in loyalties, when Shearson directed HHR to obtain the $15,000 remedial fee from Houston Biotech, HHR called its friend, John Crary, now at Houston Biotech and advised him to pay no more than one-third of the fee. Despite the clear conflict over who would pay the remedial fee, HHR continued to represent *both* Shearson and the Houston Biotech entities and never informed Shearson that the conflict had arisen or that Houston Biotech refused to pay the remedial fee as Shearson

had requested. If HHR had provided any of that information to Shearson, Shearson could have taken steps to insure the fee was paid.

HHR's shifted loyalties were vividly confirmed after HHR discovered that the deadline for amending the Texas registration had passed and that regulatory action from the Texas Securities Board was imminent. Within days of discovering the passing of the deadline, HHR drafted a memorandum to Houston Biotech's general counsel in Houston that chronicled HHR's version of the case, including alleged lapses by Shearson. The memorandum included detailed descriptions of alleged conversations between HHR and its client, Shearson, but, of course, omitted any mention of HHR's failures or conflicts of interest. Shearson was never shown or even informed of the memo, and its permission to disclose its attorney-client communications with HHR was never sought or received.

After the Texas Securities Board began enforcement action, HHR visited Texas for an "all hands" meeting regarding the oversale problem. Although Shearson discharged HHR as its counsel following the meeting, HHR continued (without Shearson's knowledge and in violation of HHR's promises) to represent the Houston Biotech entities against Shearson, particularly regarding the indemnity agreement between Shearson and the Houston Biotech entities concerning who would pay for HHR's mistake. Shearson did not learn of HHR's continued representation of Houston Biotech until discovery in this action.

Shearson properly opposed HHR's jurisdictional challenge in the trial court, preserving this issue for review by this Court. Appendix F at 25a (without exhibits).

## REASONS FOR GRANTING THE WRIT

Despite the fact that HHR's wrongful conduct was necessarily focused toward Texas and resulted in regulatory action by the Texas Securities Board, forcing the rescission offer in Texas that caused Shearson's damages, and despite the fact that this action is replete with complicated questions of Texas law and regulations, Texas courts have said that HHR is beyond the constitutional limits of their jurisdiction.

What is even more troubling, however, is that this action establishes a precedent that undermines this Court's description of the constitutional boundaries by foreclosing local courts from redressing errors by out-of-state lawyers, even when they purposefully provide legal advice and representation about state and local legal matters (causing, as HHR did, disastrous regulatory problems), and even when they represent local clients (as HHR did with Houston Biotech). This is a far too narrow reading of the constitutional limits on jurisdiction and constitutes a dangerous precedent.

The problem with this precedent is not that it misstates the relevant legal principles. The general rubrics are faithfully restated -- that, however, makes this precedent only more troubling. As this Court has noted, the constitutional boundaries are not marked by "mechanical" tests, but instead have been exemplified by application of the known standards to specific fact patterns. *See International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985); *Calder v. Jones*, 465 U.S. 783, 790 (1984)("imprecise inquiry"). Any first-year law student can recite the rule of *International Shoe*, but application of that rule can confound even the most seasoned jurist. Thus, in the jurisdictional context, the specific facts of this case provide the precedential value of the opinion.

Application of the general principles also requires an appreciation of our ever changing world, in this instance the increasing ease and frequency of persons and companies engaging in business across states lines and, concurrently, the ease in which they can defend themselves when their activities cause damage beyond the state of their residence.[3] As the nature of legal practice in this country continues to evolve along with expanding technology and our ever more integrated economy, more and more law firms are establishing national practices, from which advice about Texas law and representation in Texas courts and before Texas' regulatory agencies can be, is, and will be provided by lawyers from any number of cities and states and even countries. With emerging communications abilities, a lawyer will be able to practice law in Texas or elsewhere from Hilton Head, the Colorado Rockies, or even Bora Bora. The same factors will mean that large companies, headquartered elsewhere but with extensive business activities in Texas (like Shearson), will be hiring these non-Texas lawyers to

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[3] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)("The limits imposed on state jurisdiction by the Due Process Clause, in its role as the guarantor against inconvenient litigation, have been substantially relaxed over the years ... this trend is largely attributable to a fundamental transformation in the American economy.")(citation omitted); *McGee v. International Life Insur. Co.*, 355 U.S. 220, 223 (1957)("With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."); *Hanson v. Denkla*, 357 U.S. 235, 250-51 (1958)("As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.").

represent them in Texas and to advise them about Texas law to guide their Texas activities. The same will be true in every state.

Under the precedent set by the Houston Court of Appeals, however, Texas and other state courts will lack the jurisdiction to control this expanding practice of law that intimately affects their economy and laws. Even this case is an example of the serious implications of allowing lawyers from another state to provide legal representation and advice without the supervision of local courts: HHR's arrogant belief that it understood Texas' regulatory requirements sufficiently to spearhead the Houston Biotech offering resulted in the collapse of a $5.4 million securities offering in Texas that was meant to fund the research of a Texas medical company. Houston Biotech and Shearson were absolutely subject to the regulatory jurisdiction of the Texas Securities Board, but, unless the court of appeals' decision is reversed, Shearson's agent and self-proclaimed expert directing the Texas blue sky aspects of the offering, HHR, which caused the problem, will escape even an assessment of its responsibility. Indeed, under the court of appeals' decision, an unlicensed lawyer from another state or country who appears (both physically and via letter, phone and fax) and provides supposedly expert advice directly affecting the local economy will have far greater protection from liability and disciplinary action than a locally licensed lawyer who conducts the same activity. In fact, under the current opinion, HHR is even immune from Texas' jurisdiction for its breaches of the ethical rules governing the practice of law in Texas.

That HHR sought to represent Shearson before a state regulatory agency and to advise Shearson regarding state regulations *from another state* should heighten Texas' and this Court's concern about that conduct, not diminish it to the

point of non-interest. An inescapable fact of modern life is that more and more "national" law firms will be seeking to enter local markets, and more and more companies will be acting on their advice, with potentially severe consequences.

The Texas-centered nature of this action should also not be obscured by the fact that Shearson is legally based in New York. Without question, Shearson has a significant presence in most states, including Texas, and in this matter in particular was hired to raise funds for a Texas biotechnology company and, as a result of its lawyers' malpractice, was required by the Texas Securities Board to rescind a multi-million dollar offering in Texas -- and only Texas. HHR should no more be able to avoid Texas' jurisdiction over this problem than its client, Shearson. Indeed, there is nothing relevant about this matter that relates to any other state: the offering, the advice, and the damage are all centralized in Texas.

One indication that Shearson's allegations support jurisdiction is the meaning of any ultimate judgment (wherever obtained) against HHR. If Shearson obtains a judgment against HHR for the $5.4 million it spent for the Texas rescission (in any court of any state) that judgment can be based only on HHR's contacts in and related to Texas.

In short, this is a legal malpractice action involving incorrect advice regarding Texas law that caused a multi-million dollar securities problem in Texas, which had to be addressed at great expense by the Texas Securities Board. Texas' interests are preeminent. More importantly, the problem is sure to arise again: on a daily basis, large companies are being advised regarding their multi-million dollar transactions across the nation by a host of New York, California, and beltway lawyers, unregulated under this precedent by any court or state bar, and motivated not by

any special regard for the state in which they are practicing but by the prospects of making a profit. Local courts and bars should not avoid judicial oversight of the practice of law that so intimately affects their states and communities, particularly because of a misunderstanding of the reach of the federal Constitution, nor should legal malpractice be committed with impunity merely because the lawyers committing it have not sworn loyalty to a particular state or its laws.

**The legal standards**

Although the standards for determining questions of personal jurisdiction are well established, assessing a particular case in light of those standards remains an imprecise task of weighing specific facts against broad principles. Under Texas and federal law, jurisdiction can be exercised over HHR unless to do so would be unfair to an unconstitutional degree. As this Court has noted, Texas extends personal jurisdiction to the full limits of the United States Constitution. *Hall v. Helicopteros Nacionales De Columbia, S.A.*, 638 S.W.2d 870 (Tex. 1982), *reversed on other grounds sub.* nom., 466 U.S. 408 (1982).

In order to fulfill that minimal requirement, Shearson's claims need only "arise out of or relate to" HHR's purposeful contacts with Texas. *Helicopteros*, 466 U.S. at 414; *Keeton* 465 U.S. at 774.

The Texas courts correctly stated the relevant legal rule, but erred in analyzing the facts and Shearson's claims.

**The malpractice claim**

The core of Shearson's malpractice claim is that it hired HHR to do the blue sky work for the Houston Biotech

offering and that HHR botched the job in Texas, causing Shearson to expend over $5.4 million to rescind the Texas offering.

HHR admits that it had some responsibility for the Texas registration; HHR disclaims only that it was responsible for the oversale and its ultimately catastrophic consequences. HHR concedes that it "was involved in representing Hutton and in attempting to register these securities in the 50 states, including Texas," and that it "had some correspondence with the Texas Securities Board to answer questions about the offering."

**The lower courts improperly reached the merits of Shearson's claims.**

The decision of the court of appeals and the findings of the trial court (penned by HHR) likewise confirm that HHR purposefully established contacts with Texas when it agreed to handle the Texas registration, that it profited from those activities, and even (implicitly) that HHR could reasonably anticipate being haled into a Texas court as a result of its being hired to handle the Texas registration. Yet, both courts determined *on the merits* that, "[a]lthough HHR did have some contact with Texas during the creation of Houston Biotech Partners and the registration process, Shearson's claims did not arise until long after the registration process was complete." Appendix C at 16a.

Once HHR admits to its Texas responsibilities, however, the question of whether it properly fulfilled those duties goes solely to the merits of Shearson's claims and is irrelevant to the jurisdictional question. Of course, HHR disagrees that it had the duty to prevent the deadline from running. If it openly admits otherwise, it might as well get out its checkbook. Its desire to avoid that admission on the

merits, however, expressed in alleged limits on the scope of its engagement, does not eliminate Texas jurisdiction over Shearson's claims.

HHR subjected itself to jurisdiction in Texas (at least as to any dispute about its services in Texas) when it agreed to perform legal services in that State. HHR was Hutton's sole blue sky counsel in Texas, and HHR was amply paid to ensure that the Houston Biotech securities were fully and properly registered in Texas. Shearson's malpractice claim challenges HHR's performance, and Shearson is entitled to its day in court on that challenge. Whether HHR's responsibilities encompassed the oversale and its cure, and thus whether HHR committed malpractice, is a question of liability, not jurisdiction.

The jurisdictional determinations of the lower courts rest on a particular view of the merits of the critically disputed aspects of Shearson's claims, which should be decided by the jury, not an appellate or trial court relying on abbreviated proof. In fact, the opinion of the court of appeals depends on two *merits* rulings: (a) that HHR's task was limited to the initial registration, and (b) that HHR successfully completed that limited task (or at least no omission by HHR in finishing that work contributed to Shearson's claims).

The proper jurisdictional inquiry, however, is *not* what is the *answer* to these questions, but whether these *questions* are *sufficiently connected to Texas* that a Texas jury should answer them. There is certainly evidence presented below upon which a Texas jury could find both that (a) HHR was hired to handle the entire registration in Texas, from initial application to final sales report, and (b) HHR failed in that task. If a jury so held, it would necessarily also find the factual prerequisites for jurisdiction over HHR -- HHR

agreed to represent Shearson before the Texas regulators and failed in that task. HHR's advice concerning the cure deadline could have related to nothing other than HHR's representation of Shearson/Hutton in regard to the Houston Biotech offering in Texas; that is how HHR learned of the problem, and that is why HHR advised Shearson concerning the problem.

This Court has never addressed the sometimes confusing relationship between the merits of a plaintiff's claims and the court's jurisdiction over the defendant or the limits of the factual analyses to be taken by a lower court in making such determinations. *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 677 (1st Cir. 1992).

**The lower courts erred in analyzing the nature of the attorney/client relationship.**

The lower courts also erred in analyzing the relationship between Shearson and HHR, which in turn brought the court of appeals to its erroneous conclusion that HHR's "legal advice was sold only to Shearson in New York." Appendix C at 14a. HHR was not merely some peddler of legal advice; HHR's blue sky lawyers *represented* Shearson before the Texas Securities Board and directly communicated with the regulators here in behalf of Shearson.

The distinction is critical: an attorney is not a merchant. Under Texas law, an attorney does not sell a product in the strict sense; the relationship of an attorney and a client is an agency relationship. *E.g., Portnow v. Berg*, 593 S.W.2d 843, 845 (Tex.Civ.App. -- Houston [1st Dist.] 1980, no writ). That is, HHR was Shearson's agent before the Texas State Securities Board, and as a result of HHR's admittedly national blue sky practice, HHR acted as agent of each of its clients in Texas on a regular basis. HHR

concedes that Texas is a critical state in almost every blue sky registration.

In regard to the Texas blue sky process, Shearson needed representation only in Texas, not California or New York. It was solely and necessarily HHR's conduct as Shearson's agent before the Texas Securities Board that resulted in Shearson's being required by that Board to rescind the entire Texas offering.

**The lower courts ignored the reasonably foreseeable results of HHR's advice.**

Also resting on the court of appeals' conclusion that HHR's "defective advice regarding the cure of the oversale was directed at Shearson in New York and not at Texas" is the court's rejection of specific jurisdiction based on the reasonably foreseeable effects of HHR's advice in Texas. Appendix C at 18a. The court of appeals' error in this regard tracked that of the trial court, which found that "[i]n connection with the oversale problem . . . HHR did not intentionally cause any effect in Texas."

Again, the court's analysis is too narrow. The critical element is not where Shearson physically received HHR's advice (Shearson has offices worldwide), but instead where Shearson was foreseeably going to act (or not act) on the advice. HHR's advice to Shearson regarding the oversale and when to file the final sales report could only have been intended to direct Shearson's (and HHR's, as Shearson's and Houston Biotech's agent) activities in Texas. This was not a hypothetical question, designed to satisfy the curiosity of a New York executive. HHR knew, as Shearson's agent for the Texas blue sky registration, that Shearson needed its legal advice in order to act properly in Texas. HHR advised Shearson how to act in Texas, but did so inadequately,

causing a significant and eminently foreseeable consequence here. Thus, the advice had to have been directed at Texas.

The results of that advice were also foreseeable and foreseen. Gordon Kanofsky, the principal HHR attorney involved in the Houston Biotech offering, admitted that his "initial reactions and concerns" about the Texas oversale were "the possibility that the state regulators would take the view that the investors who had purchased those securities might be able to have the right to rescind their purchase of securities." The record confirms that Kanofsky never conveyed that concern until the deadline for avoiding rescission had expired. So, not only was the Texas rescission foreseeable, HHR actually did foresee that eventuality, and that eventuality came to pass.

To subject itself to jurisdiction in Texas, the defendant need only take some action from which a reasonable foreseeable result occurring in Texas can be inferred. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984); *Calder*, 465 U.S. at 789-90.

The lower courts erred by requiring, not just that HHR intentionally have directed activities at this State, but that it have intended to cause the result that occurred. The test is not so limited. For example, if a person intentionally shoots at a bird across the Oklahoma/Texas state line, but hits a child instead, Texas courts would have jurisdiction based on the defendant's intentional conduct directed at Texas (the shot) and the reasonably foreseeable result (that the defendant could miss and hit something else). Texas jurisdiction would not depend on whether it was murder. Perhaps even more analogous: if a hunting guide negligently instructed a child in Oklahoma to shoot at a bird in Texas, with the same unwanted consequences, that guide should be subject to jurisdiction in this State for causing a reasonably foreseeable result here.

In effect, the precedent set by the lower courts would limit effects-based jurisdiction to intentional torts. Those committing negligence could not be touched.

**Shearson's New York headquarters is irrelevant to the jurisdictional inquiry.**

The trial and appellate courts were preoccupied with Shearson's New York base.[4] Although no one denies that Shearson's activities span the country, and in this case predominated in Texas, the lower courts repeatedly emphasized Shearson's New York home.

This emphasis was misplaced. This Court has noted that a plaintiff's residence is of very limited importance in determining jurisdiction over the defendant. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980); *Keeton*, 465 U.S. 770. The proper jurisdictional inquiry "focuses on 'the relationship among the *defendant*, the forum, and the litigation.'" *Keeton*, 465 U.S. at 775 (*quoting Shaffer*, 433 U.S. at 204) (emphasis added). As noted in *Keeton*, although the "plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry," its primary significance is that it may "enhance the defendant's contacts with the forum." *Id.* at 780. "But plaintiff's residence in the forum state is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Id.*

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[4] The trial court in particular has demonstrated a proclivity for dismissing actions by out-of-state plaintiffs. *See General Electric Co. v. Brown & Ross Int'l Distrib.*, Inc., 804 S.W.2d 527 (Tex.App. -- Houston [1st Dist.] 1990, writ denied)(reversing dismissal for want of personal jurisdiction by same court and Judge as in this case below.).

**The lower courts ignored HHR's self-proclaimed national blue sky practice.**

Even if HHR's advice concerning the Texas oversale could be analyzed apart from the rest of the Houston Biotech offering, it cannot be viewed apart from HHR's national blue sky practice. Even if a California lawyer's "one shot" advice concerning Texas law would not subject that attorney to suit in Texas, HHR's advice to Shearson was not a "one shot" proposition. HHR has purposefully created and promoted a national blue sky practice, which necessarily includes advice concerning and affecting Texas law.

A defendant that markets itself nationally is subject to jurisdiction wherever its product foreseeably causes harm. *World-Wide Volkswagen*, 444 U.S. at 297-98; *Keeton*, 465 U.S. 770. In *World-Wide Volkswagen*, this Court held that, if the sale "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to gain directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been a source of injury . . . ." 444 U.S. at 297.

HHR's "product" (indulging the court of appeals' inadequate buyer-seller analogy) is its legal advice and representation concerning blue sky matters, and HHR unquestionably markets that "product" in all 50 states. In this case, HHR's product was defective and caused Shearson injury here. It is hardly unfair that HHR be required to defend itself here; certainly HHR had no difficulty in charging Shearson for its advice concerning Texas law or for its several trips here for the Houston Biotech offering.

**Shearson's breach of fiduciary duty and contract claims**

The core of these claims lies in HHR's divided loyalties before the cure problem arose. HHR's conflict began when Shearson took over Hutton, which both threatened HHR's future blue sky work and created a potential conflict of interest between HBI and Shearson, both of whom were represented by HHR. In fact, HHR recognized the potential for conflict between HBI and Shearson immediately, and promised to cease representation if such a conflict arose.

As predicted by HHR, a conflict did arise -- the question (prior to the deadline) of who was going to pay the $15,000 fee for the oversale cure.

When the conflict arose, HHR chose sides: when Shearson instructed HHR to instruct Houston Biotech to pay the remedial fee, HHR ignored that instruction, and instead recommended to its other client (Houston Biotech in Texas) that it pay no more than one third of the fee. The resulting impasse was not resolved before the deadline expired. In fact, HHR never even informed Shearson that Houston Biotech would not pay the fee; the last Shearson knew before the deadline ran was its instruction to HHR to get the fee paid by Houston Biotech.

As a result of HHR's conflicting communications to its clients with conflicting interests, the deadline passed without the fee being paid.

The lower courts' analysis ignores HHR's representation of *Houston Biotech* regarding the oversale *in conflict with Shearson*. While all of HHR's advice regarding the oversale was intended to affect activities in Texas (what to do before the Texas regulatory agency), HHR's advice to

Houston Biotech was actually delivered *to Houston, Texas*. This advice helped cause the problem, because HHR, in violation of its instructions from, and in violation of its fiduciary duty to, Shearson, its ostensible client, gave different advice to its other client, Houston Biotech, to Shearson's detriment, on an issue in which their interests conflicted. Of note: HHR charged *Shearson* for its calls to Houston Biotech (in Houston) during this same period.

In fact, the whole oversale problem had its genesis in this potential conflict. When HHR advised Shearson to register a small amount of securities in Texas, HHR was saving Houston Biotech money, not Shearson, because Houston Biotech had the burden of paying those fees.

The predicate of the fiduciary duty claims (including for breach of contract) is HHR's representation in Texas of a Texas company. Shearson is entitled to its day in court to assert that claim.

The lower courts also ignored the facts that HHR (a) failed to inform its client Shearson that John Crary (the Hutton/Shearson employee who selected HHR for the blue sky work) was planning to leave Shearson for Houston Biotech, despite his signing for Shearson the important agreements between the Houston Biotech entities and Shearson, or even (b) that HHR was charging Shearson for work done in behalf of Houston Biotech and Crary, namely Crary's consulting agreement with Houston Biotech. Even if Shearson's claims were limited to HHR's disclosure in Texas of Shearson's privileged communications (and they are not),[5] Shearson would be entitled to assert that claim in

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[5] HHR also disclosed confidential communications when its told Houston Biotech representatives in Houston that it had informed Shearson that HHR believed that Houston Biotech should not be forced

Texas. Even after its own narrowing of Shearson's claim on this point, the court of appeals denied jurisdiction, again, based on its assessment of the merits of that claim -- that a post-deadline disclosure did not cause Shearson's damage. As before, it was wrong to approach the merits at all and wrong in the way it decided them.

## CONCLUSION

When Shearson was confronted with a threat of enforcement action by the Texas Securities Board because of the Texas oversale problem, it had no choice but to defend itself in Texas. It did so, while its lawyers, who had caused the problem by failing to give Shearson complete advice, sought behind its back to saddle Shearson with that liability. Now, all Shearson requests is its day in court to prove that HHR caused it to be standing before the Texas Commissioner. It is only fair. It is certainly constitutional.

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to pay the full remedial fee.

Petitioners respectfully pray that his petition for writ of certiorari be granted.

Respectfully submitted,

Wynne & Maney

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(Counsel of Record)

Mark Maney

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## APPENDIX A

September 11, 1992

Mr. Mark Maney
Wynne & Maney
2730 Texas Commerce Tower
Houston, Texas 77002-2913

Mr. Parker C. Folse, III
Susman Godfrey
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002-5096

Re: Cause No. 91-38067; Shearson Lehman Brothers, Inc., f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc., f/k/a Shearson Hutton Holdings, Inc. vs. Hughes, Hubbard & Reed; 152nd District Court of Harris County, Texas

Dear Counsel:

By this time you must have thought that the Court had gone on vacation after hearing such good arguments. However, we have made every effort to comb through the authorities as given and the arguments and what testimony was permissible before the Court, and have come to the decision that the case should be removed to a New York forum.

In any event, the contacts made by the defendant firm are not such to justify jurisdiction in a Texas court. It is the finding of the Court that it does not have personal jurisdiction over defendant HH&R, and the motion presented and argued, objecting to personal jurisdiction, is granted.

Again, many thanks for a well-presented, scholarly and gentlemanly approach to the entire problem.

Sincerely,

Jack O'Neill
Judge, 152nd District Court

JON:dpk

## APPENDIX B

91-038067

| | | |
|---|---|---|
| SHEARSON LEHMAN BROTHERS, | § | IN THE |
| INC. f/k/a SHEARSON | § | DISTRICT |
| LEHMAN HUTTON, INC. and | § | COURT |
| SHEARSON LEHMAN BROTHERS | § | OF |
| HOLDINGS, INC. f/k/a | § | |
| SHEARSON LEHMAN HUTTON | § | HARRIS |
| HOLDINGS, INC. | § | COUNTY |
| Plaintiffs, | § | TEXAS |
| | § | |
| v. | § | |
| | § | 152ND |
| HUGHES HUBBARD & REED | § | JUDICIAL |
| Defendant. | § | DISTRICT |

**ORDER**

The Court has carefully considered the Special Appearance of defendant Hughes Hubbard & Reed to challenge the personal jurisdiction of the Court, as well as the pleadings, the relevant record, and the arguments of counsel in open court. Based upon that consideration, the Court hereby GRANTS defendant's motion. It is, therefore, ORDERED that plaintiff's suit is dismissed for lack of personal jurisdiction over the defendant.

IT IS SO ORDERED.

SIGNED this 16th day of September, 1992.

/s/ Jack O'Neill
THE HONORABLE JACK O'NEILL
DISTRICT JUDGE

## APPENDIX C

**SHEARSON LEHMAN BROTHERS, INC., INC.,f/k/a Shearson Lehman Hutton, Inc., and Shearson Lehman Brothers Holdings, Inc., f/k/a/ Shearson Lehman Hutton Holdings, Inc., Appellants,**

**v.**

**HUGHES, HUBBARD, & REED, Appellee,**

**No. 01-92-01114-CV.**

Court of Appeals of Texas, Houston (1st Dist.).

June 1, 1995.

Rehearing Overruled July 13, 1995.

New York-based investment banking company sued New York based law firm, for malpractice in connection with offering of Texas limited partnership interest, and large oversale of securities in Texas, which necessitated company rescission of Texas offering. Law firm made special appearance to contest personal jurisdiction. The 152nd District Court, Harris County, Jack O'Neill, J., dismissed, holding that contacts of law firm were insufficient to support exercise of personal jurisdiction, and investment banking company appealed. The Court of Appeals, Andell, J., held that Texas court could not exercise general or specific jurisdiction over law firm.

Affirmed.

**1. Appeal and Error 840(2)**
**Courts 35**

During special appearance hearing, nonresident defendant has burden of proof to negate all bases of personal jurisdiction; and on appeal, Court of Appeals will review all the evidence in the record to determine if nonresident met this burden.

**2. Securities Regulation 11.10**

To offer limited partnership interests for sale nationally, securities must first be registered with the SEC and with the appropriate state regulatory authority for every state in which the securities are to be sold.

**3. Constitutional Law 305(5)**
**Courts 12(2.1)**

A Texas court may exercise jurisdiction over a nonresident if: the Texas long-arm statute authorized the exercise of jurisdiction, and the exercise of jurisdiction is consistent with federal and state constitutional guarantees. U.S.C.A. Const.Amend. 14; V.T.C.A., Civil Practice & Remedies Code § 17.042.

**4. Courts 12(2.15)**

Texas long-arm statute authorizes exercise of jurisdiction over nonresident "doing business" in Texas; the broad language of the statute's "doing business" requirement permits the statute to reach as far as the federal constitutional requirements will allow. V.T.C.A., Civil Practice & Remedies Code § 17.042.

**5. Constitutional Law 305(5)**

Federal constitutional requirements of due process limit the power of the state to assert personal jurisdiction over nonresident defendant; and due process requirement is divided into two parts; whether nonresident defendant has purposely established minimum contacts with forum state; and if so, whether the exercise of personal jurisdiction comports with "fair play and substantial justice." U.S.C.A. Const.Amend. 14.

**6. Constitution Law 305(5)**

Minimum contacts analysis, in considering whether the exercise of personal jurisdiction over a nonresident defendant comports with due process, requires determination of whether the nonresident defendant has purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; this "purposeful availment" requirement ensures that nonresident defendant will not be haled into a jurisdiction based solely upon random, fortuitous, or attenuated contacts, or the unilateral activity of another party or third person. U.S.C.A. Const.Amend. 14.

**7. Courts 12(2.5)**

General personal jurisdiction may be asserted when the cause of action does not arise from, or relate to, the nonresident defendant's purposeful conduct within the forum state, but there are continuous and systematic contacts between the nonresident defendant and the forum state.

**8. Courts 12(2.5)**

When general personal jurisdiction is asserted over a nonresident defendant, the minimum contacts analysis requires showing of substantial activities in the forum state.

**9. Courts 12(2.25)**

New York law firm was not subject to general personal jurisdiction in Texas, even though it had "national Blue Sky practice," and provided legal advice concerning blue sky matters in all 50 state, where plaintiff in malpractice case provided no evidence to support claim that law firm marketed its legal services on national scale, there was no evidence that law firm marketed its legal services anywhere other than where its offices were located, law firm's legal advice was sold to investment banking company only in New York, and only product sold nationally was limited partnership interests in offering.

**10. Courts 12(2.10)**

For specific personal jurisdiction to be asserted, cause of action must arise out of or relate to nonresident defendant's contact with the forum state in order to satisfy the minimum contacts requirement; the contact must have occurred as a result of nonresident defendant's purposeful conduct, and not the unilateral activity of the plaintiff or others.

**11. Courts 12(2.25)**

New York law firm was not subject to specific personal jurisdiction in Texas in malpractice case brought by investment banking company that underwrote securities offering, even though law firm made two trips to Texas, and

communicated by telephone, mail, and fax with Texas regulatory agencies, personnel of partnership of which securities were being offered, and Texas law firm, where investment banking company's claims based on oversale of securities in Texas and failure to cure oversale prior to statutory deadline, did not arise until long after registration process was closed, fact that investment banking company sold more of securities in Texas than had been registered did not negate validity of initial registration work performed by law firm, all communications between law firm and investment banking company regarding Texas oversale, took place in and between California and New York and all of law firm's acts or omissions relating to its research occurred in law firm's Los Angeles office. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Civ.St. Art. 581-7, subd. A(1).

**12. Courts 12(2.25)**

Alleged foreseeability of consequences of allegedly negligent legal advice, given to New York client, within forum state, and regarding Texas law, did not support exercise of specific personal jurisdiction over New York law firm by Texas court. U.S.C.A. Const.Amend. 14.

**13. Constitutional Law 305(5)**

Foreseeability of consequences within forum state has never been sufficient benchmark for personal jurisdiction under federal due process; foreseeability has been held to be enough only in those cases in which the nonresident defendant could or should have foreseen consequences that occurred within the forum state because the consequences were the result of the defendant's intentional conduct directed at the forum state. U.S.C.A. Const.Amend. 14.

**14. Attorney and Client 109**

Client, an investment banking company, could not maintain suit against law firm for breach of fiduciary duty in connection with oversale of securities which necessitated rescission of offering in state, even though law firm disclosed communications between investment banking company and law firm to business partner in partnership for which securities were being offered without obtaining permission for investment banking company prior to doing so, where disclosure occurred well past point at which oversale of securities could have been cured, and thus could not serve as basis for claim against law firm on issue of the oversale.

Kenneth R. Wynne, Mark Maney, Gregory A. Pierce, Houston, for appellants.

Parker C. Folse, III, Houston, for appellee.

Before ANDELL and HUTSON-DUNN, JJ., and DUGGAN,* Justice (Retired).

**OPINION**

ANDELL, Justice.

This is an appeal from the trial court's granting of the special appearance of appellee, Hughes, Hubbard & Reed (hereinafter HHR). Appellants, Shearson Lehman Brothers, Inc. and Shearson Lehman Brothers Holdings, Inc.

* Justice Duggan, who retired on December 31, 1994, continues to sit by assignment for the disposition of this case, which was submitted prior to that date.

(collectively Shearson), contend that trial court erred when it dismissed their malpractice and breach of fiduciary duty claims against HHR. We are presented with the issue of whether HHR's contacts with the State of Texas were sufficient to establish personal jurisdiction. We hold that they were not, and affirm the trial court's dismissal.

**Standard of Review**

[1] During a special appearance hearing, a nonresident defendant has the burden of proof to negate all bases of personal jurisdiction. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex.1985); *Project Eng'g USA v. Gator Hawk*, 833 S.W.2d 716, 719 (Tex.App.— Houston [1st Dist.] 1992, no writ). On appeal this Court will review all the evidence in the record to determine if the nonresident met this burden. *General Elec. Co. v. Brown & Ross Int'l Distrib., Inc.*, 804 S.W.2d 527, 529-30 (Tex.App.— Houston [1st Dist.] 1990, writ denied).

**Facts**

E.F. Hutton & Co., Inc. (Shearson's predecessor in interest), an investment-banking company based in New York City, agreed to underwrite an offering for its client, Houston Biotech, Inc. (HBI). To this end, HBP, a separate limited partnership, was created by HBI and Hutton, and HBP securities in the form of limited partnership interests were registered and offered publicly nationwide. The "blue sky" section of HHR's Los Angeles office was retained by Hutton personnel in New York to act as legal counsel in the creation of HBP and the registration process. HHR is a law firm based in New York City with offices in New York, Los Angeles, Washington, D.C., Miami, and Paris.

[2] To offer securities for sale nationally, the securities must first be registered with the SEC and with the appropriate state regulatory authority for every state in which the securities are to be sold. HHR was responsible for registering HBP's limited partnership interests nationally, including in Texas. After the HBP offering closed, it was discovered that a large oversale of HBP securities had occurred in Texas. Although Texas law provided a remedy for curing an oversale,[1] the statutory deadline for effecting such a cure passed without any action being taken. Shearson complains that they were forced to rescind the Texas offering as a result of HHR's legal malpractice and HHR's breach of their fiduciary duty to Shearson.

It is Shearson's contention that HHR's contacts with Texas, as set out in the record, were sufficient to establish both general and specific jurisdiction. The facts relied upon by Shearson in support of their claims are: (1) the nature of HHR's "blue sky" legal practice; (2) the agreement between Shearson and HHR that HHR would be responsible for the registration of the securities; (3) three trips made by HHR personnel to Texas and; (4) various communications by HHR personnel with individuals and state agencies in Texas.

**Exercise of jurisdiction by a Texas court**

[3] A Texas court may exercise jurisdiction over a nonresident if: (1) the Texas long-arm statute authorizes the exercise of jurisdiction; and (2) the exercise of jurisdiction is consistent with federal and state constitutional guarantees.

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[1] 68th Leg., R.S. ch. 238, § 81, 1985 Tex.Gen. Laws 1179, 1201, *amended by* Act effective September 1, 1987, 70th Leg., R.S. ch. 732, § 2 1987 Tex.Gen.Laws 2638, 2639-40 (current version at TEX.REV.CIV.STAT.ANN. art. 581-35 E (Vernon 1991).

*Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex.1990); *General Elec. Co.*, 804 S.W.2d at 530.

**The Texas long-arm statute**

[4] The Texas long-arm statute authorized the exercise of jurisdiction over a nonresident "doing business" in Texas. TEX.CIV.PRAC. & REM.CODE ANN. § 17.042 (Vernon Supp.1995). The broad language of the statue's "doing business" requirement permits the statute to reach as far as the federal constitutional requirements will allow. *Guardian Royal Exch. Assurance v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex.1991). Therefore, we need only consider whether it is consistent with federal constitutional requirements of due process for Texas courts to assert in personam jurisdiction over a nonresident defendant. *Id.* at 226.

**Federal constitutional due process**

[5] Federal constitutional requirements of due process limit the power of the state to assert personal jurisdiction over a nonresident defendant such as HHR. *Helicopteros 'Nacionales de Colombia v. Hall*, 466 U.S. 408, 413-14, 104 S.Ct. 1868, 1871-72, 80 L.Ed.2d 404 (1984). The United States Supreme Court divides the due process requirement into two parts: (1) whether the nonresident defendant has purposely established minimum contacts with the forum state; and (2) if so, whether the exercise of jurisdiction comports with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1985).

[6] Minimum contacts analysis requires a determination of whether the nonresident defendant has

purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Guardian Royal*, 815 S.W.2d at 226. This "purposeful availment" requirement ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon "random," "fortuitous," or "attenuated" contacts or the "unilateral activities of another party or third person." *Id.* at 226 (citing *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2183). Minimum contacts analysis has been further refined into general and specific jurisdiction.

**(1) General jurisdiction**

[7,8] General jurisdiction may be asserted when the cause of action does not arise from, or relate to, the nonresident defendant's purposeful conduct within the forum state, but there are continuous and systematic contacts between the nonresident defendant and the forum state. *Guardian Royal*, 815 S.W.2d 223, 228; *Schlobohm* , 784 S.W.2d at 357. When general jurisdiction is asserted, the minimum contacts analysis requires a showing of substantial activities in the forum state. *Id.*

[9] Shearson asserts that HHR maintained continuous and systematic contacts with Texas. They contend that by virtue of its "national Blue Sky practice," HHR subjected itself to jurisdiction in any state where it provided advice concerning that state's laws. Shearson argues that HHR markets its "product" (i.e., its legal advice concerning "blue sky" matters) in all 50 states. Since its product, HHR's advice concerning Texas law, was "defective", Shearson maintains that jurisdiction is proper in Texas. We disagree.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567, 62 L.Ed.2d 490

(1980), the Supreme Court held that "if the sale of a product ... arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other states, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." Likewise, the Supreme Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984) held that when the respondent magazine had "continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."

Although Shearson contends that these cases are controlling, we disagree. Shearson confuses the idea of nationally marketing a product, as in *World-Wide* and *Keeton*, and marketing a product such as legal advice on state blue sky laws, that is national in scope. Shearson provides no evidence to support their claim that HHR marketed its legal services on a national scale. In fact, there is no evidence to show that HHR marketed its legal services anywhere other than where its offices were located. The product that was sold nationally in this case was HBP in the form of limited partnership interests. HHR's legal advice was sold only to Shearson in New York. Therefore, Shearson has failed to show how HHR's having a "national blue sky" practice can support a finding of general jurisdiction.

In *Billingsley Parts and Equipment, Inc. v. Vose*, 881 S.W.2d 165, 169 (Tex.App.— Houston [1st Dist.] 1994, writ denied), we held that a nonresident defendant, who initiated contact with a Texas company, made numerous phone calls to them over a period of one year, and was paid commissions by checks drawn on a Texas bank, did not have systematic and continuous contacts with Texas sufficient to support a

finding of general jurisdiction. *Id.* at 169. An examination of the contacts between HHR and Texas clearly shows that they were far more limited than those rejected by this court in *Billingsley*. Therefore, we hold that HHR's contacts with Texas were not so systematic or continuous to serve as the basis for general jurisdiction in a Texas court.

**[2] Specific jurisdiction**

[10] For specific jurisdiction to be asserted, the cause of action must arise out of or relate to the nonresident defendant's contact with the forum state in order to satisfy the minimum contacts requirement. *Guardian Royal*, 815 S.W.2d at 227. The contact between the nonresident defendant and the forum state must have occurred as a result of the nonresident defendant's purposeful conduct and not the unilateral activity of the plaintiff or others. *Id.* at 227.

> Furthermore, the nonresident defendant's activities must have been "purposefully directed" to the forum and the litigation must result from alleged injuries that "arise out of or relate to" those activities. When specific jurisdiction is asserted, the minimum contacts analysis focuses on the relationship among the defendant, the forum and the litigation.

*Guardian Royal*, 815 S.W.2d at 228 (citations omitted).

[11] Shearson contends that its claim arise out of HHR's purposefully directed contacts with Texas. However, Shearson is mistaken. Although HHR did have some contact with Texas during the creation of HBP and the registration

process,[2] Shearson's claims did not arise until long after the registration process was completed.

**(a) The registration process**

Shearson contends that the facts that an oversale of the HBP securities occurred in Texas,[3] and that statutory deadline for effecting a cure of the oversale passed before any action was taken to solve the problem, prove that HHR did not successfully complete its Texas registration work. Shearson argues that it was required to rescind the Texas offering because the HBP securities were not properly registered in Texas. Shearson's analysis of the situation is exactly backwards. Under Texas law, "No dealer, agent or salesman shall sell of offer for sale any securities ... *except those which shall have been registered* ...." TEX.REV.CIV.STAT. ANN. art. 581-7(A)(1) (Vernon 1964) (emphasis added). Shearson, on the advice of HHR, directed HHR to register $1 million of HBP securities in Texas and HHR successfully did so.[4] Shearson was fully aware of the amount of securities registered, and took no action to have the original registration amended. The fact that *Shearson* sold millions of dollars more of the HBP

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[2] HHR made two trips to Texas and communicated, by telephone, mail, fax, with Texas regulatory agencies, HBI personnel and Vinson & Elkins, a Texas based law firm representing HBI during the registration process.

[3] Oversales of the HBP securities also occurred in two states other than Texas.

[4] When Shearson representatives in Texas began to sell the HBP securities prior to the completion of the registration process, Shearson immediately retained a Texas law firm to act as counsel in dealing with the problems that this situation created with the Texas regulatory agencies. Shearson was well aware of when the securities were properly registered and when they were not.

securities in Texas than had been registered does not negate the validity of the initial registration.[5] We hold that Shearson's claims against HHR did not arise as a result of HHR's contacts with Texas during the registration process. Therefore, those contacts cannot serve as the basis for asserting specific jurisdiction over HHR.

**b) The malpractice claim**

Shearson contends that HHR committed legal malpractice and as a result, Shearson was forced to expend over $5.4 million to rescind the Texas offering. The core of Shearson's malpractice claim is that HHR failed to do any research in regards to the Texas oversale problem and therefore did not advise Shearson that there was a statutory deadline for effecting a cure. This, Shearson contends, was the direct cause for Shearson's having to make the rescission offer in Texas.

All communications between HHR and Shearson in regards to the Texas oversale, up to and beyond the passing of the deadline to cure, took place in and between California and New York. All of HHR's acts or omissions relating to its research occurred in HHR's Los Angeles office. Nevertheless, it is Shearson's contention that HHR is subject to the jurisdiction of a Texas court solely on the basis of HHR's advice to Shearson regarding the oversale.

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[5] HHR was not involved in the sale of the HBP limited partnership interests beyond registering the securities for sale and was not aware that oversales had occurred in three states until some time after the HBP offering had closed.

**Foreseeability**

Shearson contends that the Texas rescission was the reasonably foreseeable result of the failure of HHR to advise them of the deadline for the cure of the oversale. Therefore, Shearson claims that HHR should be subject to jurisdiction in Texas on the basis of foreseeability alone.

Shearson relies on a line of cases which hold that even if a defendant performs no physical act within the state, activities outside the state can provide adequate contacts to support jurisdiction if they have reasonably foreseeable consequences within the state. *See, e.g., General Elec. Co.*, 804 S.W.2d at 533 (citing *Siskind v. Villa Foundation for Education, Inc.*, 642 S.W.2d 434, 438 n. 5 (Tex.1982)); *see also Calder v. Jones*, 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984). In each of the cases cited by Shearson in which the activities of the nonresident defendant outside the forum state were found to be sufficient to support jurisdiction on the basis of their foreseeable consequences within the state, the finding of foreseeability was based on the *intentional activities* of the nonresident defendant *directed at the forum state*.

[12] This is not the case here. HHR was unaware of the existence of a deadline for curing the oversale in Texas until several weeks after the deadline had expired. In addition, the allegedly defective advice regarding the cure of the oversale was directed at Shearson in New York and not at Texas.

[13] Forseeability alone has never been a sufficient benchmark for personal jurisdiction under federal due process. *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. at 566. Foreseeability has been held to be enough only in those cases in which the nonresident defendant could or

should have foreseen the consequences that occurred within the forum state because the consequences were the result of the defendant's intentional conduct directed at the forum state. Shearson has cited no law to support its contention that the negligent advice of a nonresident law firm, directed at a New York client regarding an aspect of Texas law, should subject that law firm to the jurisdiction of Texas courts. To hold that the foreseeability analysis of *General Electric* should apply in this case would greatly expand that doctrine beyond its present reach and we decline to do so.

**c) The breach of fiduciary duty claim**

Shearson contends that HHR represented both Shearson and Houston Biotech entities,[6] and that a conflict arose out of that dual representation. This, Shearson claims, caused HHR to neglect its duties to Shearson resulting in the passing of the deadline and the necessity of the rescission offer.

**[14]** The only example of HHR's breach of its fiduciary duty to Shearson, however, is that HHR disclosed communications between Shearson and HHR to the Houston Biotech entities without obtaining permission from Shearson prior to doing so. The disclosure to which Shearson refers occurred well past the point at which the oversale could have been cured and thus can not serve as the basis for a claim against HHR on the issue of the oversale.

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[6] Originally HBP's management was controlled by Hutton but when Shearson acquired and merged into Hutton it triggered the right of HBI to acquire HBP's management interest. HHR continued to represent both Shearson and the Houston Biotech entities after informing them both of the potential for future conflict and requesting permission from both to do so.

**Venue notion of the trial court**

Shearson complains that the trial court incorrectly applied a venue-type analysis to the facts of the case rather than the proper jurisdictional analysis. Having found that the trial court was correct in concluding that Texas courts do not have personal jurisdiction over HHR in this case, we conclude that the trial court did not err in its analysis.

**Conclusion**

We hold that HHR's contacts with Texas were inadequate to establish either general or specific jurisdiction in Texas under a minimum contacts analysis. In so holding, we also hold that the evidence was sufficient to support the findings of the trial court and the trial court did not impermissibly reach the merits of the case or err by failing to make additional findings.

We affirm the judgment of the trial court.

## APPENDIX D

**THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

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November 22, 1995

Mr. Kenneth R. Wynne
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002-2913

Mr. Mark Maney
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002

Mr. Parker C. Folse, III
Susman Godfrey
5100 First InterState Bank Plaza
1000 Louisiana
Houston, TX 77002-5096

RE: Case Number 95-0901

Style: SHEARSON LEHMAN BROTHERS, INC., f/k/a/ SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC., f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC. v. HUGHES, HUBBARD & REED

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk
by /s/
Courtland Crocker
Deputy

## APPENDIX E

**THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

January 11, 1996

Mr. Kenneth R. Wynne
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002-2913

Mr. Mark Maney
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002

Mr. Parker C. Folse, III
Susman Godfrey
5100 First InterState Bank Plaza
1000 Louisiana
Houston, TX 77002-5096

RE: Case Number 95-0901
Style: SHEARSON LEHMAN BROTHERS, INC., f/k/a SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC., f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.

v.

HUGHES, HUBBARD & REED

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK
BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

## APPENDIX F

No. 91-038067

| | | |
|---|---|---|
| SHEARSON LEHMAN BROTHERS | § | IN THE |
| f/k/a SHEARSON LEHMAN | § | DISTRICT |
| HUTTON, INC. and SHEARSON | § | COURT |
| OF LEHMAN BROTHERS HOLDINGS, | § | |
| INC. f/k/a SHEARSON LEHMAN | § | HARRIS |
| HUTTON HOLDINGS, INC., | § | COUNTY |
| Plaintiffs, | § | TEXAS |
| v. | § | |
| | § | 152ND |
| HUGHES, HUBBARD & REED | § | JUDICIAL |
| Defendants. | § | DISTRICT |

SHEARSON'S MEMORANDUM IN OPPOSITION TO HHR'S SPECIAL APPEARANCE

Shearson Lehman Brothers, Inc, f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc., ("Shearson") respectfully submit this memorandum and supporting evidence in opposition to the special appearance of the defendant, Hughes, Hubbard & Reed ("HHR").

Introduction

At bottom, Shearson sues the law firm of HHR for giving it incomplete and incorrect legal advice concerning Texas' Blue Sky laws that caused the Texas State Securities Board to order Shearson to offer rescission to all Texas residents who had purchased limited partnership units in a Texas-based limited partnership. The rescission offer cost Shearson over $5.4 million, all of which it paid in Texas to Texas investors. As part of the engagement involving its bad

advice, HHR lawyers personally travelled to Houston, Texas at least three times (the third time to address the problem their bad advice had caused), telephoned to Texas, wrote to Texas, delivered applications, and reports to Texas for filing with the State Securities Commissioner, and filed reports directly with the State Securities Commissioner and the Secretary of State.

In the face of these facts, HHR challenges this Court's jurisdiction, claiming that it is fundamentally unfair to expect a national law firm (by definition practicing in all states) to defend in Texas claims involving its incorrect advice about Texas law that resulted in an enforcement action by an agency of The State of Texas. HHR necessarily also challenges this Texas Court's interest (a) in policing attorneys who provide advice concerning Texas law and (2) in determining the cause and responsibility for violations of Texas securities laws.

HHR girds its feeble position with a litany of cases that uniformly deal with one irrelevant scenario: client sues an out-of-state attorney who was hired to represent the client in the attorney's home state. Those cases simply do not apply here. In fact, they do not even come close. As HHR admits, HHR was hired by E.F. Hutton & Company Inc. ("Hutton," now Shearson) to do the state blue sky work in connection with an offering of securities by a Texas-based company. HHR's Memorandum at 7. HHR's legal advice and conduct was not limited to California or New York law -- it reached nearly every state, including Texas. Shearson sues HHR as a result of HHR's actions related to the Texas aspects of that offering, including particularly HHR's incorrect advice concerning Texas law, and HHR's breach of its fiduciary duties to Hutton and Shearson by its actions in Texas and directly affecting Hutton and Shearson in Texas.

Not only is the law HHR cites irrelevant, its recitations of fact are untrue: HHR represented Shearson in Texas, negotiated and communicated directly with governmental agencies of the State of Texas as well as private entities within Texas, and it continues even in 1992 to represent companies in Texas, including those involved in Shearson's problem here. In short, HHR practiced and continues to practice law in this State and is therefore subject to the jurisdiction of the Courts of this State for its malpractice here.

Because jurisdictional inquiries are heavily fact-intensive, this memorandum begins with discussions of HHR's contacts with this forum.

HHR's Contacts with Texas

1. HHR agreed to represent Hutton in connection with an offering of securities by a Texas-based biotechnology firm, Houston Biotechnology Incorporated or HBI. Exhibit A, excerpts of the deposition of Gordon Kanofsky, an HHR partner, at 4, 25, 26-28, 37, 49-52, 78-79; Objections and Answers of Hughes, Hubbard & Reed to Plaintiffs' First Set of Written Interrogatories ("HHR's Interrogatory Answers") at 15.

2. HHR lawyers travelled to Texas and represented Hutton in its negotiations with HBI concerning Hutton's and HBI's respective duties related to the offering. There were two "sides" for these negotiations, and HHR was clearly on the side of Hutton. Exhibit A at 83-84, 86-90; HHR's Interrogatory Answers at 15.

3. HHR drafted the resulting contract (the Sales Agency Agreement) between Texas-based HBI and Hutton, one of the terms of which required HBI to advance all blue

sky filing fees. Exhibit A at 93-94, 242-243; HHR's Interrogatory Answers at 15.

4. HHR participated in the decision that the offered securities would be units of limited partnership interest in a newly formed entity to be based in Texas, Houston Biotech Partners, LP ("HBPLP"). Exhibit A at 26-39, 383-386.

5. HHR had the principal role in drafting the operative documents for creating the Texas-based HBPLP. Exhibit A at 26-39.

6. HHR represented the interests of Texas-based HBPLP in regards to the offering, as well as Hutton. Pursuant to the Sales Agency Agreement drafted by HHR, HBPLP was to be the issuer of the securities, so Hutton (as sales agent) and HHR (as Hutton's counsel) represented some of the interests of HBPLP (as delineated in the Sales Agency Agreement). Additionally, Hutton had a management interest in Texas-based HBPLP through a wholly owned subsidiary, created with HHR's assistance. HHR also represented that entity's interests. Exhibit A at 26-39, 88-90, 191-192.

7. HHR drafted the operative documents for receiving authorization for HBI, HBPLP and VRP (HBPLP's general partner) to do business in Texas. HHR filed those documents directly with the Texas Secretary of State. Exhibit A at 28; Exhibit B, excerpts of the deposition of Mary Hood (an HHR paralegal at all relevant times), at 104-109, 148, 79-80.

8. HHR lawyers visited Texas as part of the due diligence for the offering. Although the offering was national in scope, Texas, as the home of the business being

sold, was viewed as a critical state, and the due diligence in Texas was essential to the engagement. Exhibit A at 79, 83, 85, 91-92; Exhibit B at 39.

9. HHR advised Hutton to register fewer units in Texas than Hutton wanted and intended to sell here -- based upon HHR's understanding of how Texas registration fees were assessed. Exhibit A at 93-93; Exhibit B at 30-33, 42-46. The under-registration in Texas led directly to the oversale of units in Texas upon which this suit focuses.

10. HHR in its "Blue Sky Memorandum" to Hutton advised Hutton regarding the requirements of Texas law. The memorandum failed to warn of the severe consequences of an oversale in Texas, despite HHR's advice to under-register here. Exhibit C, excerpts of the deposition of Doreen Heywood (an HHR paralegal at all relevant times), at 112-113.

11. HHR prepared the Blue Sky application to register the HBPLP units in Texas. The implication in HHR's memorandum that this task was completed by Vinson & Elkins ("V&E") is simply untrue. HHR drafted all required forms, leaving only a blank for a V&E attorney to sign. HHR also communicated directly with HBI to complete that task. V&E fronted the initial application solely because that firm was better known to the Texas regulators. HHR did all of the substantive work. V&E was to forward any comments by the Texas regulators instantly to HHR for its preparation of responses. Moreover, V&E represented the issuer (HBI), not Hutton. Hutton was represented by HHR. Exhibit A at 50-51, 139, 301-311, 314, 382-383; Exhibit B at 63-64, 137-139, 141, 142, 145-146, 156-157, 163; Exhibit C at 125-126

12. HHR communicated directly with the Texas regulators regarding the offering in Texas. Exhibit A at 82, 314; Exhibit B at 170-171.

13. HHR lawyers travelled to Texas to supervise the printing of the prospectus for the offering. Exhibit A at 83.

14. HHR continued its representation in regards to the offering after Hutton merged into and became Shearson. The Shearson takeover of Hutton, however triggered a right in Texas-based HBI to take over Hutton's management interest in Texas-based HBPLP. HBI exercised that option. Exhibit A at 317-323, 336-338, 369.

15. HHR negotiated and drafted (supposedly on behalf of Shearson) the agreements between Shearson and HBI, whereby Texas-based HBI succeeded to Hutton's management role in Texas-based HBPLP. Exhibit A at 317-318, 369.

16. HHR, at the same time, was aware, but did not inform Shearson, that HHR's main contact person at Hutton (and subsequently Shearson) (and also the individual in charge of the HBI offering) was planning to leave Shearson to join HBI and HBPLP in Texas. Exhibit A at 52-54.

17. HHR drafted the consulting agreement between its contact person at Shearson and HBI/HBPLP, whereby the Shearson employee in charge of the offering shifted his allegiance from Shearson to HBI/HBPLP. HHR charged Shearson for that work without Shearson's consent. Exhibit A at 343-349, 360-362.

18. HHR never informed Shearson that its officer in charge of the offering was leaving Shearson to join HBI and HBPLP in Texas, that HHR had drafted that officer's consulting agreement with HBI and HBPLP (at Shearson's unwitting expense), and had allowed that same officer to sign the change of control documents between Shearson and HBI, on behalf of Shearson, despite HHR's knowledge that he was soon leaving Shearson for HBI/HBPLP. Exhibit A at 348-349, 360-362.

19. HHR informed Shearson in this same time period that, if it developed any conflict of interest because of HBI's takeover of Shearson's management interest in HBPLP, HHR would represent none of the parties involved. Of course, HHR's loyalties had already shifted to Texas along with HHR's favorite ex-Hutton contact. Exhibit A at 341-343.

20. HHR learned, along with Shearson, in late May, 1988, that there had been an oversale in Texas of over $5,000,000. This information was provided to HHR to enable it to complete the final sales report for filing in Texas and close the offering here. Such sales reports were an important part of HHR's duties. Exhibit B at 25, 93; Exhibit C at 36-37, 95-96, 130-134, 160.

21. HHR advised Shearson that pursuant to Texas law the oversale could be cured by paying a special fee, including a penalty, of approximately $15,000. Exhibit A at 145-146, 151, 158; Exhibit C at 165-168.

22. HHR did no research to substantiate its advice to Shearson regarding Texas law, relying instead upon one HHR's partner's off-the-cuff opinion that she thought Texas law permitted such a cure. Exhibit A at 60-61, 111-113. If HHR had done the barest amount of research (simply reading

the relevant provision of the Texas statute would have sufficed), HHR would have learned that a deadline loomed for paying that fee, which if missed would result in a rescission offer to all Texas purchasers. Exhibit A at 72, 77, 285-290.

23. HHR incorrectly surmised (again with no research) that the deadline for paying the late filing fee under Texas law was late-August. It was actually July. HHR forwarded that incorrect information to Shearson through its friend (and ex-Hutton/Shearson officer) now at HBI. Exhibit A at 133-136.

24. HHR, in direct contravention to Shearson's instructions, advised HBI in Texas that Shearson should pay the penalty portion of the fee. Shearson had instructed HHR to convince HBI to pay the full fee in accordance with the Sales Agency Agreement, which HHR had drafted. Exhibit A at 122-124, 129-131. HHR never consulted that agreement, but proceeded to ignore Shearson's instructions by suggesting to HBI that it pay only the non-penalty portion of the fee. Exhibit A at 59-60, 165-166, 203-204, 247-250; Exhibit C at 144-145.

25. HHR never informed Shearson that it had not followed Shearson's instructions or that a conflict had arisen between HBI/HBPLP in Texas and Shearson, or that HHR was siding with HBI/HBPLP in Texas. Exhibit A at 246-247; Exhibit C at 173.

26. HHR never informed Shearson that it had learned from HBI in Texas that, in accordance with HHR's advise, HBI refused to pay the filing fee. Exhibit A at 243-244, 249-251; Exhibit C at 151.

27. HHR never informed Shearson that there was a deadline under Texas law for paying the fee. Indeed, HHR informed Shearson after the deadline had passed that the cure was still available. Exhibit A at 158, 160-161, 169-170. As a direct result of the deadline's passing, the State of Texas ordered that rescission be offered to all Texas investors in HBLPL.

28. HHR's loyalties to HBI shifted wholeheartedly once it was discovered that the deadline for curing the oversale had passed and that rescission would therefore have to be offered to all Texas purchasers. At HBI's request, HHR prepared and sent a memorandum to HBI in Texas detailing HHR's version of alleged failings by Shearson. The memorandum included detailed descriptions of attorney/client communications between HHR and Hutton/Shearson. Of course, the memorandum neglected to mention HHR's failure to apprise Shearson of the deadline under Texas law, HHR's disobedience of Shearson's instructions, or HHR's conflict of interest. Exhibit A at 71, 208-213, 253-258.

29. HHR never requested or received Shearson's permission to disclose its attorney/client communications to HBI in Texas. Exhibit A at 71, 208-213, 253-258.

30. HHR visited Texas in September (its third such trip on the engagement) for an "all hands" meeting regarding the oversale. Exhibit A at 84, 172, 417.

31. HHR thereafter, and perhaps before, began representing HBI and HBPLP in Texas in regards to the oversale, including the obtaining and drafting an indemnity agreement whereby Shearson absorbed full financial responsibility for the Texas rescission. Of course, this continued representation was in violation of HHR's promise

to Shearson not to represent any party if any conflict arose. Exhibit A at 215-217, 229-242, 418-425.

32. HHR continues to represent Texas-based HBI (which has succeeded to all of HBPLP's interests) to date. Exhibit D, the affidavit of John Bingham (an officer of HBI).

33. Shearson has expended over $5.4 million in Texas to comply with the rescission ordered by the State of Texas.

HHR is Amenable to Jurisdiction
in Texas for its Texas Malpractice

HHR's contacts go far beyond the minimal requirements of the Due Process Clause. Due process requires only that (1) the defendant purposefully establish "minimum contacts" with Texas, (2) that the plaintiffs' claims "arise out of or relate to" those contacts, and (3) that the assumption of jurisdiction does not "offend traditional notions of fair play and substantial justice." See Guardian Royal Exchange Assur. Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223. 230 (Tex. 1991). Jurisdiction also exists if HHR's contacts with the forum are "continuous and systematic." Id. This type of jurisdiction is termed general jurisdiction, while jurisdiction limited to related claims is termed special jurisdiction.

HHR has the burden to "negate all bases of personal jurisdiction." Id. at 231 n. 13 (citing Zac Smith & Co. v. Otis Elevator Co., 734 S.W.2d 662, 664 (Tex. 1987)); see also Smith v. Reynolds, 533 S.W.2d 861, 862 (Tex. Civ. App. -- San Antonio 1976, no writ)("It is settled that a defendant filing a special appearance under Rule 120a has the burden of pleading and proving that he is not amenable to process issued by the Courts of Texas.").

1. Special Jurisdiction

Although HHR correctly quotes the applicable rule for gauging whether this Court can exercise special jurisdiction over HHR, HHR's analysis of that test goes far afield. The first prong of the test is that the defendant "purposefully established 'minimum contracts' with Texas," not that the defendant (or even the plaintiff) resides or is based in Texas. See Guardian Royal, 815 S.W.2d at 230. Minimum contacts also "need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice." Great w. United Corp. v. Kidwell, 577 F.2d 1266-67 (5th Cir. 1978)(citations omitted), rev'd on other grounds sub. nom., LeRoy v. Great W. United Corp., 443 U.S. 173 (1979); See also Burger King Corp. v. Rudzeuwicz, 471 U.S. 462, 472-78 (1985); Mississippi Interstate Express, Inc. v. Transportation, Inc., 681 F.2d 1003, 1007-11 (5th Cir. 1982). In this case, HHR's advice concerning Texas law (from wherever it originated) and HHR's conflict of interest with HBI/HBPLP (in Texas) had direct and foreseeable consequences in Texas: a $5.4 million rescission offer to all Texas purchasers of HBPLP units.

Moreover, HHR engaged in many activities in Texas, including direct communications with State agencies and private entities within Texas, all of which predicate Shearson's claims. In short, HHR practiced law in this State, and therefore should expect to defend its actions here.

The second prong requires only that the plaintiff's claims "arise out of or relate to the nonresident defendant's contacts with Texas." Guardian Royal, 815 S.W.2d at 230. All of Shearson's claims against HHR arise out of and relate to HHR's representation of Hutton, Shearson, and then HBI\HBPLP in regards to the HBPLP offering in Texas.

HHR incorrectly attempts to narrow the relevant contacts by focusing on HHR's version of Shearson's claims and on HHR's version of what contacts support liability. For example, in footnote 6 to its memorandum, HHR argues that its negotiation of the Sales Agency Agreement between HBI and Hutton is irrelevant to the jurisdictional analysis because, in HHR's view, such action, although occurring in and directed at Texas, does not predicate liability. HHR is wrong in its view of Shearson's claim of liability (the Sales Agency Agreement obligated HBI to pay the curative filing fee, contrary to HHR's advice), but more importantly, HHR is wrong to assert that the issue of liability governs the jurisdictional determination.

HHR's "[u]ltimate liability is not a jurisdictional fact, and the merits of the cause of action not at issue." Portland Savings & Loan Ass'n v. Bernstein, 693 S.W.2d 478, 480 (Tex.App. -- Corpus Christi 1984, writ ref'd n.r.e.), cert. denied, 475 U.S. 1016 (1986); see also Zac Smith & Co. v. Otis Elev. Co., 734 S.W.2d 662 666 (Tex. 1987). The existence of the contact to Texas, alone, "is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort." Portland Savings, 693 S.W.2d at 480 (citation omitted; emphasis in original). Jurisdiction is supportable if HHR's alleged liability arises out of HHR's Texas contacts. Shearson's claims clearly arise out of HHR's Texas law advice and its representation of the conflicting interests of HBI and HBLPL, Texas residents.

HHR also attempts to confuse the issue by focusing on other of its actions, unrelated to the Texas offering, somehow suggesting that because HHR also represented Shearson outside of Texas, it is unfair to require that HHR defend itself here. Those other and additional actions, are, however, irrelevant to this inquiry under the same analysis

that determines what contacts are relevant. If HHR is liable to Shearson for causing rescission to all Texas investors, that liability is necessarily predicated on HHR's advice and actions related to Texas. HHR's actions in regards to any other state could not have caused Shearson's damage here. Thus, HHR's liability necessarily arises out of its Texas related contacts, and HHR is therefore amenable to this Court's jurisdiction.

The final jurisdictional requirement is that the "assumption of jurisdiction must not offend traditional notions of fair play and substantial justice." Guardian Royal, 815 S.W.2d at 230. "In this inquiry it is incumbent upon the defendant to present 'a compelling case that the presence of some consideration would render jurisdiction unreasonable.'" Id. at 231 (quoting Burger King, 471 U.S. at 477; other citations omitted; emphasis added). HHR has totally failed to make any showing that defending this action in Texas will be unfair or prejudicial.

Another relevant inquiry to this requirement is "the interests of the forum state in adjudicating the dispute." Id. Of course, Texas has a compelling interest in regulating those who practice law here and in determining the cause of a $5.4 million rescission offer ordered by the State of Texas.

Thus, this case is distinguishable from the cases cited by HHR, all of which deal with lawyers acting solely within the confines of the state in which they practice. Here, HHR's malpractice involves advice as to Texas law. HHR represented the conflicting interests of two Texas-based entities (HBI and HBPLP) resulting in a breach of its fiduciary duty and express promises to Shearson. The breach of HHR's promise to Shearson even continues to date because HHR continues to represent HBI and continues to assert against Shearson an attorney/client privilege as to

HHR's communications with Texas-based HBI. And finally, Shearson's claims against HHR and its damages necessarily arise out of and relate solely to HHR's Texas contacts.

Even if HHR's malpractice and breach of fiduciary duty were not focused in Texas, the effect of HHR's malpractice was felt here, and that is sufficient to support jurisdiction. See, e.g., Kidwell, 577 F.2d at 1266-67.

Finally, contrary to HHR's assertions, the exercise of jurisdiction over a non-resident law firm by a non-resident is not unprecedented, although not as common as the situation described in HHR's irrelevant authority. See RAF Financial Corp. v. Resurgens Communications Group, Inc., 127 B.R. 458 (D. Col. 1991) (jurisdiction supported by far less contact then occurred here). In that case, RAF, a Colorado resident, filed suit in Colorado against Resurgens, a Florida Company later residing in Georgia. RAF alleged that Resurgens "did not effectuate the registration of certain warrants and underlying shares with the Securities and Exchange Commission" as required by a previous settlement between the parties, resulting in a loss to the Colorado plaintiff of over one million dollars. Id. at 460. Resurgens in turn sued its Miami lawyers, K&L, who had failed to register the securities properly. K&L had no Colorado partners, no assets in Colorado, and all of its services were provided in Miami.

K&L argued that it was not subject to the jurisdiction of Colorado Courts "because K&L performed all legal services from its Miami office and could not anticipated [sic] being 'hailed' into court in Colorado. Furthermore, K&L argue[d] that any damage that Resurgens may incur will accrue in Georgia where it is presently domiciled." Id. at 463.

The Court found K&L subject to jurisdiction because it had undertaken, on behalf of Resurgens, to protect the interests of Colorado residents, and it was K&L's malpractice that resulted in the damage to Colorado residents for which they were attempting to hold K&L's client, Resurgens, liable. Id. at 465.

With far more direct contact with Texas than that, HHR caused Shearson to become responsible to HBI and HBPLP, Texas residents, for the rescission offer to HBPLP's Texas residents.

2. General Jurisdiction

HHR totally ignores and thus does not negate the requirements of general jurisdiction. As demonstrated below, HHR has practiced law in this State from since at least 1988 through the present. HHR even advertises its continued representation of HBI in its firm brochure.

For these reasons, the defendant, Hughes, Hubbard & Reed, is amenable to this Court's jurisdiction and should be required to defend its actions in this Court of laws.

Respectfully submitted,

Wynne & Maney

/s/

Kenneth R. Wynne
Texas Bar No. 22110000
Mark Maney
Texas Bar No. 12898200

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Counsel for Plaintiffs, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc.

CERTIFICATE OF SERVICE

A true and correct copy of the above has been served by hand delivery on August 9, 1992 to the following attorney of record:

Mr. Parker C. Folse, III
Susman Godfrey
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, TX 77002-5096

/s/ Mark Maney
Mark Maney